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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a
Delaware corporation,

Plaintiff,

v.

VITAL PHARMACEUTICAL, INC aka
VPX, a Florida corporation,

Defendant.

Case No. 08-CV-1545 IEG (WVG)

**EVIDENTIARY OBJECTIONS AND
REQUEST TO STRIKE PORTIONS OF
THE DECLARATIONS AND REPORTS OF
ROBERT KENNEDY, ITAMAR SIMONSON,
TANYA SCHIERLING, AND EXHIBITS IN
THE NOTICE OF LODGMENT, IN SUPPORT
OF DEFENDANT VITAL
PHARMACEUTICALS, INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
PLAINTIFF'S CLAIMS FOR DAMAGES**

Before: Hon. Irma E. Gonzalez
Date: April 12, 2010
Time: 10:30 a.m.
Courtroom: 1

Defendant Vital Pharmaceuticals, Inc. ("VPX") presents the following Evidentiary Objections and Request to Strike Portions of the Declarations and Reports of Patrick Kennedy ("Kennedy") and Itamar Simonson ("Simonson"), the Declaration of Tanya Schierling, and Exhibits attached to the Notice of Lodgment filed by Hansen Beverage Company ("Hansen") in support of its Opposition to the Motion of VPX for Summary Judgment, Or In The Alternative, Summary Adjudication of Issues.

1 I. INTRODUCTION.

2 The Declaration of Patrick Kennedy, Hansen's damages expert, and his attached report
3 expressly state that Kennedy has no basis for presenting any support for a damages claim, even
4 though VPX's produced its financial information on March 3. The Kennedy Declaration and
5 Kennedy report provide no evidence supporting Hansen's damages claim and are irrelevant.

6 The Declaration of Itamar Simonson, Hansen's marketing expert, merely authenticates his
7 report. That report fails to establish a rationale for the opinions in accordance with proper legal
8 requirements for presenting surveys to consumer understanding not found in the express marketing
9 statements, and moreover it fails to address the issue of the determination of damages. As support
10 for the objections with regard to Dr. Simonson's report, excerpts from the deposition transcripts of
11 Itamar Simonson are attached as Exhibit A to the concurrently filed Droste Declaration.

12 The Declaration of Tanya Schierling purports to authenticate exhibits attached to a Notice
13 of Lodgment. The Schierling Declaration and these exhibits also fail to present relevant evidence
14 to create a triable controversy on damages.

15 Summary judgment cannot be avoided by the presentation of speculation, and instead the
16 opposing party must present admissible evidence that creates a triable controversy on material
17 facts.

18 Federal Rules of Evidence, Rule 702, provides as follows regarding the requirements for
19 expert testimony.

20 If scientific, technical, or other specialized knowledge will assist the trier of fact to
21 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
22 knowledge, skill, experience, training, or education, may testify thereto in the form of an
23 opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the
24 testimony is the product of reliable principles and methods, and (3) the witness has applied
25 the principles and methods reliably to the facts of the case.

26 "Though the district judge serves as a gatekeeper for expert evidence, it is an important role
27 designed to extract evidence tainted by farce or fiction. Expert evidence based on a fictitious set of
28 facts is just as unreliable as evidence based upon no research at all. Both analyses result in pure

1 speculation. We find the testimony properly excluded on this ground.” Guillory v. Domtar
 2 Industries Inc., 95 F.3d 1320, 1331 (5 C.A. 1996), emphasis added. See also Clock Spring, L.P. v.
 3 Wrapmaster, Inc., 2008 WL 6759952 *8 (S.D. Tex Feb. 12, 2008) (recommending defendant’s
 4 motion for summary judgment be granted based on speculative expert opinions).

5 An expert opinion is rejected if it is not based on the correct legal standard applicable to the
 6 case, such as here, the law governing false advertising. Straumann Company v. Lifecore
 7 Biomedical Incorporated, 278 F. Supp. 2d 130, 135 (D. Mass 2003) (expert’s conclusion “is based
 8 on an erroneous legal standard, and the opinion cannot defeat summary judgment”). See also In re
 9 Omnicom Group, Inc. Securities Litigation, 2010 WL 774311, *10 (C.A.2 N.Y.) (summary
 10 judgment granted despite conflicting expert study which was found insufficient to create genuine
 11 dispute).

12 The correct legal standard for evaluating the alleged falsity of efficacy statements such as
 13 “*7 Hour Energy Boost” is whether the stated effects are experienced by the average consumer,
 14 not “all” of them on “each” occasion. See Tambrands, Inc. v. Warner-Lambert Co., 673 F. Supp.
 15 1190, 1194 (S.D.N.Y. 1987), in which the defendant, in support of its advertising claims,
 16 contended that all negative pregnancy results (as opposed to all positive results as well) could be
 17 known in ten minutes – not that the product would thus perform for “all” consumers. Id. at 1193,
 18 fn. 5. The legal test for the truthfulness of the efficacy claim was with reference to whether “the
 19 majority of women will know” both positive and negative pregnancy test results in ten minutes.
 20 Id. at 1194. This “average consumer” test for efficacy claims is the legal standard. See also
 21 VPX’s Opp. to Hansen’s MPSJ, pp. 10-13: Morris v. Group W, Inc., 66 F.3d 255, 257-8 (9th Cir.
 22 1995); Hansen Beverage Co. v. Innovation Ventures, LLC, 2009 WL 1543451 *2 (E.D. Mich. June
 23 2, 2009).

24 Assertions about “impressions” likely to be understood by consumers that are not expressed
 25 in the subject marketing statement must be evidenced by valid consumer surveys or other
 26 appropriate evidence and cannot be based on conjecture. See SmithKline Beecham Consumer
 27 Healthcare., L.P. v. Johnson & Johnson-Merck Consumer Pharmaceuticals, Co., 906 F. Supp. 178
 28 (S.D. N.Y. 1995). See also Federal Rules of Evidence, Rule 702; Guillory v. Domtar Industries

1 Inc., 95 F.3d supra at 1331 (5 C.A. 1996) (holding that the district court properly excluded expert
2 testimony, which was not based upon the facts in the record but on altered facts and speculation
3 designed to bolster plaintiff's position).

4 As support for these objections, excerpts from the deposition transcripts are attached as
5 Exhibits to the concurrently filed Droste Declaration.

6 The Court is respectfully requested to make rulings on these objections at the time of the
7 hearing.

8
9 II. OBJECTIONS TO KENNEDY REPORT.

10 Kennedy admits that neither his declaration nor his report provides any information
11 regarding the calculation of damages, whether as to amount or methodology. As explained below,
12 VPX objects to that report as follow:

- 13 A. Lacking foundation.
- 14 B. Speculative.
- 15 C. Irrelevant.
- 16 D. Improper opinion.
- 17 E. Improper legal conclusion.

18 The Kennedy report offers nothing that can be used to support Hansen's damages claim.
19 Rather, despite VPX's production of its financial records on March 3, Kennedy admits that he has
20 nothing to present as of March 22, 2010, the date Hansen's opposition was due.

1 III. OBJECTIONS TO ITAMAR SIMONSON REPORT.

2 Simonson provides no substance in his declaration and merely authenticates his prior
3 report. As explained below, VPX objects to that report as follows:

4 A. Failure to base opinions on consumer surveys regarding interpretation of “*7 Hour
5 Energy Boost” and “No Crash” message.

6 B. Failure to present opinion based on correct legal standard.

7 C. Lacking foundation.

8 D. Speculative.

9 E. Irrelevant.

10 F. Improper opinion.

11 G. Improper legal conclusion.

12 Simonson’s report, not based on a consumer survey or any other proper basis, speculates
13 that “An energy drink presented as providing seven hours of energy and no crash is *likely to create*
14 *the impression* that a comparison energy drink that does not promise such benefits is clearly
15 inferior.” (Emphasis added.) He further speculates that “Such (mis)perceptions of brand
16 superiority will likely cause the comparison brand, including Hansen’s Monster Energy, a
17 significant loss of sales.” Moreover, his speculation about any likelihood of a “significant loss in
18 sales” is inadmissible and fails to create a triable controversy.

19 Simonson’s conclusions are nothing but speculation. (Simonson Deposition, pages 14, 15,
20 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 32, 33, 36, 43, 44, 53, 54, 56, 73, 74, 75, 82, 83, 84, 85, 86,
21 87, 88, 91, 92, 93, 94, 95, 96, 97, 98 and 101; Exhibit A to Droste Decl.) His holding a Ph.D. in
22 marketing does not place him in any superior position to make these speculative statements, and
23 his report should be rejected by the Court. Opining on what he thinks the “likely” message to
24 consumers will be based on this record is inadmissible speculation and inadmissible for ignoring
25 the correct legal standard.

26 As is apparent from his deposition testimony, Simonson also has no relevant information
27 and provides no rationale to support a damages claim.

1 IV. OBJECTIONS TO THE SCHIERLING DECLARATION AND EXHIBITS ATTACHED
2 TO THE NOTICE OF LODGMENT.

3 VPX objects to the Schierling Deposition and to the Exhibits attached to the Notice of
4 Lodgment, and their contents, as follows:

5 Exhibit 1: Declaration of Rodney Sacks in Support of Motion for Preliminary Injunction.

6 (1) Paragraph 16, in its entirety.

- 7 A. Lacking foundation.
- 8 B. Speculative.
- 9 C. Irrelevant.
- 10 D. Improper opinion.
- 11 E. Improper legal conclusion.

12
13 (2) Paragraph 17, in its entirety.

- 14 A. Lacking foundation.
- 15 B. Speculative.
- 16 C. Irrelevant.
- 17 D. Improper opinion.
- 18 E. Improper legal conclusion.

19
20 (3) Paragraph 18, in its entirety.

- 21 A. Lacking foundation.
- 22 B. Speculative.
- 23 C. Irrelevant.
- 24 D. Improper opinion.
- 25 E. Improper legal conclusion.

26
27 (4) Paragraph 19, in its entirety.

- 28 A. Lacking foundation.

- B. Speculative.
- C. Irrelevant.
- D. Improper opinion.
- E. Improper legal conclusion.

(5) Paragraph 20, lines 14-16: the phrase “instead of Hansen’s specifically because of Vital Pharmaceutical’s false advertising” and the phrase “as a direct or at least substantial result of potential customers having been driven away.”

- A. Lacking foundation.
- B. Speculative.
- C. Irrelevant.
- D. Improper opinion.
- E. Improper legal conclusion.

Exhibit 2: Excerpts from the Sacks November 17, 2009 deposition.

- A. Lacking foundation and authentication.
- B. Speculative.
- C. Irrelevant.
- D. Improper opinion.
- E. Improper legal conclusion.

Exhibit 3: Excerpts from the Hall January 8, 2010 deposition.

- A. Lacking foundation and authentication.
- B. Speculative.
- C. Irrelevant.
- D. Improper opinion.
- E. Improper legal conclusion.

1 Exhibit 4: Excerpts from the Owoc September 8, 200 deposition.

- 2 A. Irrelevant to this proceeding.

3
4 Exhibit 5: Excerpts from the Purvis December 30, 200 deposition.

- 5 A. Irrelevant to this proceeding.

6
7 Exhibit 7: Copy of purported AC Nielsen report.

- 8 A. Lacking foundation and authentication.
9 B. Speculative.
10 C. Irrelevant.
11 D. Improper opinion.
12 E. Improper legal conclusion.

13
14 Exhibit 8: Copy of purported AC Nielsen report.

- 15 A. Lacking foundation and authentication.
16 B. Speculative.
17 C. Irrelevant.
18 D. Improper opinion.
19 E. Improper legal conclusion.

1 Dated: March 29, 2010

Respectfully Submitted,

2 /S/ Alan J. Droste

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CERTIFICATE OF SERVICE BY ELECTRONIC DELIVERY – CM/ECF

I, Alan J. Droste, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed in the County of Orange, State of California.

2. My business address is 450 Newport Center Drive, Suite 500, Newport Beach, California, 92660.

3. On March 29, 2010, I served a true copy of the attached document titled exactly:

EVIDENTIARY OBJECTIONS AND REQUEST TO STRIKE PORTIONS OF THE DECLARATIONS AND REPORTS OF ROBERT KENNEDY, ITAMAR SIMONSON, TANYA SCHIERLING, AND EXHIBITS IN THE NOTICE OF LODGMENT, IN SUPPORT OF DEFENDANT VITAL PHARMACEUTICALS, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS FOR DAMAGES

by causing it to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to all other persons appearing on the docket sheet, intended to be listed below:

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Co-Counsel for Defendant

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of March, 2010, at Newport Beach, California.

/S/ Alan J. Droste

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